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Attorneys for Third-Party Defendants
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

DAVID TRINDADE, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

REACH MEDIA GROUP, LLC, a
Delaware limited liability company,

Defendant,

REACH MEDIA GROUP, LLC, a
Delaware limited liability company,

Third-Party Plaintiff,

v.

RYAN LENAHAN, an individual, **KYLE
DANNA**, an individual, and **EAGLE WEB
ASSETS INC.**, a corporation,

Third-Party Defendants.

Case No. 5:12-cv-04759 (PSG)

**THIRD-PARTY DEFENDANTS'
REPLY IN SUPPORT OF MOTION TO
STRIKE AND/OR DISMISS THIRD-
PARTY COMPLAINT**

DATE: March 12, 2013
TIME: 10:00 a.m.
CTRM: 5, 4th Floor
JUDGE: The Hon. Paul S. Grewal



1 Third-Party Defendants Ryan Lenahan ("Lenahan") and Kyle Danna ("Danna")
 2 (collectively, "Third-Party Defendants") respectfully submit the following memorandum of
 3 points and authorities in reply to Third-Party Plaintiff Reach Media Group, LLC ("RMG")'s
 4 opposition (the "Opposition") to Third-Party Defendants' motion to strike and/or dismiss
 5 third-party complaint and request for limited jurisdictional discovery.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **ARGUMENT**

8 As stated by Third-Party Defendants in their motion to strike and/or dismiss RMG's
 9 Third-Party Complaint, (1) RMG's contract and tort claims against Third-Party
 10 Defendants are not proper third-party claims to this consumer class action, (2) RMG has
 11 failed to state any of its five claims against Third-Party Defendants, and (3) Danna is not
 12 subject to this Court's jurisdiction, and RMG has made no showing thereof. In its
 13 Opposition, RMG does not provide any supportable basis for the Court to permit the
 14 Third-Party Complaint, or any of the claims therein, to move forward as part of this case.
 15 The problems inherent in RMG's Opposition include the following:

16 • **RMG's Opposition is based on unverified facts.** The entire "Statement
 17 of Facts" section of the Opposition is not supported by either citation to the pleadings or a
 18 declaration. (Opp. at 2–7.) For the most part, these statements appear to be duplicative
 19 of allegations in the Third-Party Complaint; however, to the extent additional information
 20 is included, the Court's consideration of them is improper.

21 • **According to RMG's own authority, RMG's claims are not properly**
 22 **brought in this action.** RMG admits that "the purpose of impleader is 'to promote
 23 judicial efficiency by eliminating the necessity for the defendant to bring a separate action
 24 against a third individual who may be secondarily or derivatively liable to the defendant
 25 for all or part of the plaintiff's original claim.'" (Opp. at 8 [quoting *Southwest*
 26 *Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 777 (9th Cir. 1986)].) Yet all of
 27 RMG's claims concern Third-Party Defendants' alleged liability to RMG separate and
 28



1 apart from Plaintiff's claims. Litigating these claims in the middle of Plaintiff's case will
2 frustrate judicial efficiency and, as such, they should be stricken.

3 • **RMG has not asserted a claim for indemnification.** RMG spends the
4 bulk of its argument claiming that it has "properly asserted a third-party claim by alleging
5 the existence of a contractual indemnification clause." (Opp. at 11; see also *id.* at 9–12.)
6 Yet it is still unclear whether RMG intends to assert a claim for indemnification, and the
7 Third-Party Complaint suggests RMG does not. For example, RMG's claims are
8 separately numbered and stated on the caption page of the Third-Party Complaint, and
9 indemnification is not included. In the body of the Third-Party Complaint, RMG also
10 numbers its claims as Count I, Count II, and so forth. Indemnification is simply not listed
11 as a "Count."

12 • **RMG's arguments in support of its contract claims are unclear.** RMG
13 does not address Third-Party Defendants' argument that it fails to state a prima facie
14 claim for either breach of contract or warranty. Instead, RMG simply repeats the
15 allegations of the Third-Party Complaint concerning these claims. (Opp. at 18–19.) Then,
16 RMG quizzically requests to change the "title" of its breach of warranty claim "to a claim
17 for contractual indemnification to accurately reflect the allegations and legal theory upon
18 which it is based." (*Id.* at 19.) The fact that the prima facie elements of a contractual
19 indemnification claim and a breach of warranty claim are not the same only supports
20 Third-Party Defendants' argument that RMG is playing fast and loose with its pleading,
21 hoping that if it pleads a variety of allegations, something will stick.

22 • **RMG admits that the defamatory meaning must be implied or inferred**
23 **from the allegedly libelous statements.** RMG cites *Maponics, LLC v. Wahl*, 2008 WL
24 2788282 (N.D. Cal. July 18, 2008) for the ridiculous proposition that inferences drawn
25 from an allegedly defamatory statement can, themselves, "constitute the basis for a libel
26 per se claim." (Opp. at 15.) Not only does RMG's position directly contradict the very
27 definition of libel per se in California Civil Code section 45a, but it finds no support in
28 *Maponics*. When the Court in *Maponics* held that the defamatory statement at issue



“impl[ied] a provably false assertion of fact,” the Court was deciding the issue of whether the statement was one of fact or opinion, NOT whether it was libel per se. *Maponics*, 2008 WL 2788282 at *4. In making this argument, however, RMG admits that the defamatory nature of the statements at issue depend on “explanatory matter,” “inducement,” “innuendo,” or “extrinsic fact.”¹ (*E.g.*, Opp. at 16 [“At a minimum, these comments imply...”].)

• **RMG patently ignores the “of and concerning” doctrine regarding its standing to assert a defamation claim for a statement that only references Roger Dowd, a non-party.** Instead, RMG relies entirely on *Powerlineman.com, LLC v. Kackson*, No. CIVS07-879LKK/EFB, 2007 WL 3479562 at *6 (E.D. Cal. Nov. 15, 2007), which did not address any of the many cases supporting the “of and concerning” doctrine. Moreover, *Powerlineman* is distinguishable because it involved the alleged theft of content from the plaintiff website by the defendant website’s operator for use on the defendant website—that is, that the content on the defendant website was stolen. *Id.* As such, the Court’s departure from the “of and concerning” doctrine to hold that the statement “was directed toward the website as much as it was directed toward its operator,” makes some sense in that context, but does not extend to the circumstances at hand.

• **RMG does not provide any basis for its request to conduct jurisdictional discovery regarding Danna.** Jurisdictional discovery is only permitted where the claimant has demonstrated there are pertinent, controverted facts at issue regarding discovery that require further investigation. See, e.g., *Herman v. YellowPages.com, LLC*, 780 F. Supp. 2d 1028, 1036 (S.D. Cal. 2011). RMG does not provide a single allegation in either the Third-Party Complaint or its Opposition

¹ In this portion of its opposition, RMG contends that Lenahan accuses Dowd “of asserting a ‘BS story’ about the requirements of the marketing materials.” (Opp. at 15.) Here again, RMG is reading into the statement, which concludes with “...which I did under threat and now hes claiming its unapproved BS story.” It is difficult to see how the phrase “BS story” used on Facebook could constitute anything but opinion. That said, the clause is still subject to two interpretations: (1) that Dowd is claiming Lenahan’s use of approved marketing materials is an “unapproved BS story,” or (2) that Dowd’s claims are a “BS story.”



1 suggesting that Danna could be subject to the Court's jurisdiction. "In opposition to a
 2 defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the
 3 burden of establishing that jurisdiction is proper." *Boschetto v. Hansing*, 539 F.3d 1011
 4 (9th Cir. 2008). RMG has not even attempted to meet that burden and, as such, should
 5 not be permitted to go on a jurisdictional fishing expedition. See, e.g., *Concord Servicing*
 6 *Corp. v. JPMorgan Chase Bank, N.A.*, No. CV 12-0438-PHX-JAT, 2012 WL 2913282 at
 7 *4 (D. Ariz. July 16, 2012); *NuboNau, Inc. v. NB Labs, Ltd.*, No. 10CV2631-LAB BGS,
 8 2011 WL 5237566 at *3 (S.D. Cal. Oct. 31, 2011); see also *Boschetto, supra*, 539 F.3d at
 9 1020 (Jurisdictional discovery should not be granted "based on little more than a hunch
 10 that it might yield jurisdictionally relevant facts.").

11 CONCLUSION

12 For the all of the foregoing reasons, in addition to those stated in their moving
 13 papers, Third-Party Defendants respectfully request that the Court strike and/or dismiss
 14 the Third-Party Complaint in its entirety.

15 Respectfully submitted,

16 DATED: January 31, 2013

KRONENBERGER ROSENFELD, LLP

17 By: s/ Virginia Sanderson
 18 Virginia Sanderson

19 Attorneys for Third-Party Defendants Ryan
 20 Lenahan and Kyle Danna

